IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GARY W. REGESTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: CPU4-10-002221
	)	
NANCY A. WOLF,	)	
	)	
Defendant.	)	
	)	

Date Submitted: April 29, 2011
Date Decided: July 13, 2011

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DECISION
ON PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

In this proceeding, Plaintiff Gary W. Regester brings this Motion for leave to file an Amended Complaint. Defendant Nancy A. Wolf opposes the Motion. After consideration of the pleadings and upon hearing oral argument from the parties, the Court finds as follows:

Nature and Stage of the Proceedings

This is a debt action commenced with the filing of the Complaint on March 26, 2010 by Plaintiff Gary W. Regester (hereinafter "Regester" or "Plaintiff"). Service was perfected upon Defendant Nancy A. Wolf (hereinafter "Wolf" or "Defendant") on April 22, 2010. Counsel for Defendant entered their appearance on April 27, 2010 and subsequently filed a Motion to Dismiss on May 17, 2010. Defendant's Motion to Dismiss was withdrawn on June 4, 2010.

Plaintiff filed the Motion to Amend the Complaint on March 21, 2011 to which Defendant filed a Response in Opposition to the Motion on April 25, 2011. On April 29, 2011, the Court heard oral arguments on the Motion and reserved decision.

Facts

Plaintiff filed this action on March 26, 2010 in this Court alleging Defendant owes Plaintiff the principal sum of $10,500.00, plus interest at the rate of 5.5% per annum from March 13, 2007 pursuant to a debt, note, contract, deficiency balance and/or legal obligation further identified as Exhibit A. Counsel for Defendant entered their appearance on April 27, 2010 and filed a Motion to Dismiss on May 17, 2010. Defendant's Motion to Dismiss was treated as withdrawn by the Court because Counsel for Defendant did not appear at the Motion Hearing on June 4, 2010. Approximately one (1) year after the filing of the Complaint, Plaintiff brings the Motion to Amend the Complaint on March 21, 2011.

Regester moved pursuant to *Court of Common Pleas Civil Rule 15 (a) and (c)*, to amend his complaint to add U.S. Tax Resolutions, P.A. (hereinafter "U.S. Tax Resolutions"), as a party Defendant. Secondly, Register seeks to add a second cause of action alleging fraud.

Plaintiff asserts that the amendments relate back to the date of filing of the Complaint and are not barred by the Statute of Limitations.

The Amended Complaint seeks to add the following allegations: 1) that on or about March 13, 2007, Plaintiff entered into an agreement with the Defendants, for preparation and filing of various tax returns as further identified in "Exhibit A"; and 2) that Plaintiff made payments to Defendants from October 30, 2006 to October 1, 2007, in the amount of $10,500.00 for preparation and filing of the aforementioned tax returns."

Further, the Amended Complaint seeks to clarify the allegation of breach of contract by adding the following: 1) that on or about October 7, 2007, Plaintiff terminated the agreement in writing as illustrated in "Exhibit B," because Defendant breached the parties' agreement by failing to prepare and file certain returns and negligently preparing and filing returns as identified in "Exhibits C and D"; and 3) as a result of Defendants' breach, Plaintiff suffered damages in the amount of $6,000.00.

Finally, the amendment seeks to add an additional cause of action for fraud supported by the following allegations: 1) that pursuant to the parties' agreements and discussions, Defendant, Nancy A. Wolf, made representations to Plaintiff that she was a certified public accountant and her business, U.S. Tax Resolutions, P.A., was registered and licensed to do business in Delaware and Pennsylvania as evidenced by "Exhibit A"; 2) that Defendant further represented that U.S. Tax Resolutions, P.A., would prepare and file the various tax returns as identified in the parties' agreement or if the returns were sent to a third-party for preparation, Defendants were "responsible for exercising reasonable care in preparing" the tax returns, and the tax returns "will be subjected to . . . normal quality

control procedures" as evidenced by "Exhibit A"; 3) that the aforementioned representations made by Defendants were false and Defendants knew the falsity of these representations at the time they were made as further illustrated in "Exhibit E"; 4) that Plaintiff detrimentally relied on the representations of Defendants, and Plaintiff would not have entered into an agreement with Defendants for preparation and filing of tax returns and filing if Plaintiff was aware of the falsity of the representations; 5) that as a result of Defendants' fraudulent representations and conduct, Plaintiff was forced to retain another accountant to correct negligently prepared returns and finish uncompleted tax returns that were part of the parties' agreement; 6) that Plaintiff incurred $23,410.75 in accounting fees and costs to correct and complete the tax returns pursuant to the parties' agreement as evidenced by "Exhibit E"; and 7), that for the reasons cited, Plaintiff prays for judgment against the Defendants, as follows: 1) for the sum of $6,000.00 for breach of contract and the value of its performance; 2) for interest thereon at the legal rate from March 19, 2008; 3) for $23,410.75 in compensatory damages for fees and expenses to correct Defendants' negligence and fraud; 4) for punitive damages for Defendants' fraud; 5) for reasonable attorneys' fees and costs incurred herein; and 6) for such other and further relief as the Court may deem just and proper.

Discussion

The language of *Court of Common Pleas Civil Rule 15(a) Rule 15(a)* states that "a party may amend its pleading once as a matter of course at any time before a responsive pleading

is served […]. Otherwise, a party may amend the party's pleading only by leave of court […] when justice so requires."[1]

The purpose of *Civil Rule 15* is to encourage the disposition of litigation on its merits.[2] Authority in this jurisdiction provides that "an order permitting or refusing an amendment to the complaint is within the discretion of the trial court."[3] Further, "as a general rule, the risk of substantial prejudice increases with the passage of time."[4] In considering the motion, the Court shall be liberal in permitting amendments to pleadings but be mindful that such amendments should not substantially change the cause of action or introduce a different claim or defense."[5]

In *Itek Corp. v. Chicago Aerial Industries, Inc.*,[6] the Court listed several factors which a trial court may consider when analyzing a motion concerning an amendment to a complaint.[7] The Court in *Itek* stated the following should be considered: (1) the legal sufficiency of the amendment if obvious on the face of the pleading; (2) whether the proposed claim is narrow; (3) the delay in presentation; (4) whether the amendment will add to the complexity of the trial; and (4) the primary factor, whether there will be undue prejudice to the non-moving party.[8]

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[1] *Court of Common Pleas Civil Rule 15*.
[2] *Wilson v. Consumers Life Ins. Co.*, 2000 WL 1211169 at *2 (Del. Super. Ct. Aug. 1, 2000).
[3] *Timblin v. Kent General Hospital*, 1995 WL 44250 at *1 (Del. Super. Ct. Feb. 1, 1995) citing *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993) (quoting *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975).
[4] *Id*. citing 6 Charles A. Wright, et al., *Federal Practice and Procedure*, § 1488, at 670 (1990).
[5] *Id*.
[6] *Itek Corp. v. Chicago Aerial Industries, Inc.*, 257 A.2d 232 (1969), *aff'd*, 274 A.2d 141 (Del. 1971).
[7] *Timblin*, 1995 WL 44250 at *1.
[8] *Id*.

The Delaware Supreme Court has stated that "*Rule 15(a)*, in essence, allows the Court to extend a limitations period . . . to allow a plaintiff . . . 'to bring in separate entities, not originally named as defendants, and to permit such amendment after the statute of limitations has expired if the requirements of *Rule 15(c)* are satisfied.'"[9] Further, "*Rule 15(a)* instructs that 'leave to amend shall be freely given when justice so requires.'"[10]

As the Delaware Supreme Court has stated, statutes of limitations are designed and in force to "prevent a party from sleeping on ascertainable rights to the disadvantage of a defendant."[11] Further, statutes of limitations "are enacted to require plaintiffs to use diligence in bringing suits so that defendants are not prejudiced by undue delay."[12] Thus, "the relation-back doctrine obviates the force of the statute of limitations in certain situations 'to encourage the disposition of litigation on its merits.'"[13] In addition, "interpretation of *Rule 15(c)* should preserve the balance between the statute of limitations and the relation-back doctrine – encouraging the disposition of cases on their merits while ensuring defendants receive adequate notice of the claims so that they are not unduly prejudiced in defense of the action."[14]

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[9] *Brown v. City of Wilmington Zoning Bd. of Adjustment*, 2007 WL 1828261 at *8 (Del. Super. Ct. June 25, 2007) citing *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993) (citations omitted).
[10] *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001).
[11] *Id*. (citations omitted).
[12] *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001) (citations omitted).
[13] *Id*. (citations omitted).
[14] *Id*. at 7 citing *See Hill v. Shelander*, 924 F.2d 1370, 1371 (7th Cir. 1991)("The very purpose underlying the relation back doctrine is to permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced.").

However, "there are limits under *Rule 15(c)* on relating the amended pleading back to the original pleading in a case where the statute of limitations is implicated."[15] "All of the requirements set forth in *Rule 15(c) (3)* must be satisfied in order for an amendment, substituting a party after the running of the statute of limitations, to be related back to the filing date of the action.[16] Unlike subsection (a) of *Rule 15*, subsection (c) (3) includes no discretionary powers for the Superior Court to exercise."[17] Further, *Rule 15(c) (3)* "does not simply require that the party to be added as a defendant have 'notice of the action' within its specific time period. *Rule 15(c) (3)* requires that the 'party to be brought in by amendment . . . knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.'"[18] The Delaware Supreme Court has clarified that "the final requirement of *Rule 15(c)* makes it clear that relation back is limited to situations where 'but for a mistake concerning the identity' the proper party has not been sued."[19]

Thus in a given case, when the Rule is applied, the effect thereof is to 'enlarge' the limitations period. And if the resulting 'tension' between the Rule and a limitations statute is to be fairly and consistently resolved, it seems to us that the Rule must be applied in accordance with its terms."[20] Finally, "*Rule 15(c)* should not be used to bar a party from

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[15] *Brown*, 2007 WL 1828261 at *8 citing *See Naylor v. Smith*, 1997 WL 529591 (Del. Super. Ct. Feb. 10, 1997); *Hall v. McGuigan*, 1998 WL 433934 (Del. Super. Ct. Feb. 11, 1998); *Johnson v. Paul's Plastering*, 1999 WL 744427 (Del. Super. Ct. July 30, 1999); *Shively v. Ken-Crest Centers for Exceptional Persons*, 1999 WL 743507 (Del. Super. Ct. Aug. 10, 1999).
[16] *Mullen v. Alarmguard*, 625 A.2d 258, 265 (Del. 1993).
[17] *Parker v. Breckin*, 620 A.2d 229, 232 (Del. 1993).
[18] *Taylor v. Champion*, 693 A.2d 1072, 1075 (Del. 1997) citing *Superior Court Civil Rule 15(c) (3)*.
[19] *Mullen*, 625 A.2d at 265.
[20] *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975) (citations omitted).

pursuing a cause of action because of technical infirmities if the claim can fairly be decided on the merits without prejudice to the defendant."[21]

The Delaware Superior Court in *Shively v. Ken-Crest Centers for Exceptional Persons*[22] held that "*Rule 15(c)* is not limited to cases of misnomer. But it is not open season for amendments. Even assuming the 'notice of the institution of action' requirement of *Rule 15(c) (3) (A)* is met, the Court must still consider subsection (3) (B) of the Rule which states that . . . the party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."[23] Where the moving party knew of the facts upon which the proposed amendment was based and failed to include those necessary allegations from the original Complaint, then leave to amend has been denied.[24]

The crucial inquiry is "whether the newly added party knew or should have known that, but for the plaintiff's mistake, the newly added party would have been a party to the original suit."[25] The Court in *Shively* stated that "this analysis is similar to an estoppel test."[26]

A claim for fraud is governed by 10 *Del. C.* § 8106, which imposes a three-year statute of limitations period. "The cause of action accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action."[27] For tort claims, however, the cause of

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[21] *Chaplake Holdings, LTD v. Chrysler Corp.*, 766 A.2d 1, 8 (Del. 2001).
[22] *Shively v. Ken-Crest Cent. For Exceptional Persons*, 1999 WL 743507 *1, *1 (Del. Super. Ct. Aug. 10, 1999).
[23] *Shively*, 1999 WL 743507 at *1.
[24] *See Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. Ct. 1978).
[25] *Johnson v. Paul's Plastering, Inc.*, 1999 WL 744427 (Del. Super. Ct. July 30, 1999).
[26] *Shively*, 1999 WL 743507 at *1 (citations omitted).
[27] *SmithKline Beecham Pharmaceuticals Co. v. Merck & Co., Inc.*, 766 A.2d 442, 450 (Del. 2000) (internal citations omitted).

action accrues at the time of injury.[28] Here, the Plaintiff's cause of action accrued on March 14, 2007. This arises on the date Ms. Wolf allegedly injured the Plaintiff by misrepresenting that she was a Certified Public Accountant eligible to conduct business through U.S. Tax Resolutions in Delaware and Pennsylvania.

An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.[29] "No general principle of law has been better settled than that an amendment setting up a new cause of action will not relate back to the date of the original pleading, but will be governed by its own date, and an amendment will not be allowed if it introduces a new cause of action which as an independent proceeding would be barred by a statute of limitations."[30]

The addition of the claim for fraud and request for punitive damages and attorney's fees cannot properly relate back to the time of the filing of the original Complaint because the fraud claim clearly is a new cause of action unrelated to the original alleged breach of contract claim. The fraud claim is not merely a new theory of recovery as it requires separate factual proof and gives rise to its own category of damages apart from contractual damages.

The proposed amendment to add a party movant must satisfy three criteria relation-back: (1) the claim asserted in the amended pleading must arise out of the conduct,

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[28] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992).
[29] *Court of Common Pleas Civil Rule 15*.
[30] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 264 (Del. 1993).

transaction, or occurrence set forth or attempted to be set forth in the original pleading; (2) within the period provided by statute or the *Court of Common Pleas Civil Rules* for service of the summons and complaint, the party to be brought in by amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and (3) within the period provided by statute or the rules for service of the summons and complaint, the party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The Plaintiff has the burden to demonstrate that the requirements of *Rule 15(c)* have been met.[31]

In the proposed Complaint, the Plaintiff states that the contract between himself and U.S. Tax Resolutions was terminated in October 2007. Therefore, the statute of limitations with respect to any claim against U.S. Tax Resolutions ran at the latest in October 2010. While the original Complaint against Ms. Wolf for breach of contract was filed within the applicable statute of limitations, the proposed Amended Complaint to add U.S. Tax Resolutions is time-barred unless Plaintiff can demonstrate the requirements above.

The original Complaint was sufficient to put U.S. Tax Resolutions on notice that they may be subject to at least potential issues in this case. Simply put, the original Complaint while vague, even given the general notice pleading standard, is sufficient to meet the requirements of the rule. Further, I am not convinced that U.S. Tax Resolutions would be unduly prejudiced if brought into this action as a defendant. The Defendant, Nancy Wolf, President of U.S. Tax Resolutions, had notice, albeit informally, of Plaintiff Regester's

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[31] *Smith v. Hawkins*, 2008 WL 555915 at *1 (Del. Super. Ct. Jan. 31, 2008).

dissatisfaction with the services rendered by U.S. Tax Resolutions and Wolf. Defendant Wolf had knowledge that Plaintiff Regester was a client of U.S. Tax Resolutions and that she was retained to provide services to him.

Given the general policy in this jurisdiction of liberality in permitting amendments to the pleadings, the fact that discovery is still proceeding and in balancing any prejudice to the Defendant, I find that the motion to add U.S. Tax Resolutions has merit and is granted.

In summary, the motion to add the fraud claim and demand for punitive damages is denied. The motion to add U.S. Tax Resolutions as a Defendant is granted.

SO ORDERED this 13th day of July, 2011

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Alex J. Smalls
Chief Judge

Regester-OP July 2011